No. 88-1977

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

In Re:

THE BIBLE SPEAKS,

Debtor.

THE BIBLE SPEAKS, INC.,

Petitioner,

-against-

ELIZABETH DOVYDENAS,

Respondent.

On a Petition For a Writ of Certiorari to The United States Court of Appeals For The First Circuit.

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... *ii*

ARGUMENT

The Constitution Forbids Rescission on the Basis of Judicial Inquiries Into Sincerity 3

CONCLUSION 8

TABLE OF AUTHORITIES

Cases Cited:

Frazee v. Illinois Dept. of Employment Security,
109 S. Ct. 1514 (1989) 5

Gillette v. United States,
401 U. S. 437 (1979) 4, 5

United States v. Ballard,
322 U. S. 78 (1944) 4

Rule Cited:

Rule 22.5 Rules of the Supreme Court 1

Other Authorities Cited:

Brief for the National Council of the Churches of Christ in the U. S. A. and Council on Religious Freedom as *Amici Curiae* in Support of Petitioner 6

L. Tribe, *American Constitutional Law* (1987) 4

Noonan, *How Sincere Do You Have To Be To Be Religious*,
1988 U. of Ill. L. Rev. 713 ..... 4, 5

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Rule 22.5 limits a reply brief to arguments "first raised in the brief in opposition." Accordingly, petitioner refrains from further discussion of such questions as the appropriate standard of review, or even of petitioner's startling assertion that the

court below did in fact apply a "but for" causation test.[1] This reply is confined to a single question, namely, respondent's factual (opp. pp. 2 - 3) and legal (opp. pp. 6 - 9) claim that no first amendment issue is presented because the statements and conduct on which respondent relies were not part of the church's sincerely held religious beliefs.

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1 It is significant, however, that respondent nowhere quotes the language of the court below relied on by petitioner. Compare opp. pp. 4 - 5 and pp. 16 - 17 with petition for certiorari, pp. 10, 16 - 19.

ARGUMENT

The Constitution Forbids Rescission on the Basis of Judicial Inquiries Into Sincerity.

Three responses to respondent's argument are in order.

First. No "sincerity" issue is raised by the ruling of the court below. Respondent's only record reference is to several unfocussed sincerity "findings" made by the bankruptcy judge (opp. pp. 2 - 3). Respondent's additional reference to the district court's opinion is immaterial because that court did no more than apply "clearly-erroneous" review. See pet. for cert. at p. 5. Most significantly, respondent makes *no* reference whatsoever to the opinion of the court of appeals. See opp. pp. 2 - 3. Nor could she. That court categorically abjured any inquiry into petitioner's sincerity:

> Neither our decision in this case nor the proceedings below implicates the religious tenets of TBS or the beliefs of its adherents. *The findings* and rulings *rest solely on secular statements* and actions. *The facts* relied upon *have not been derived from an inquiry* into the religious principles of TBS or the truth and *sincerity of its adherents'* beliefs. There has been no inquiry as to whether Stevens and the other TBS adherents were acting in

> accord with what they perceived to be the commands of their faith . . .

869 F. 2d at 845: App. p. 45a, quoted in petition at pp. 11 - 12 (italics supplied).

Second. No decision of this Court in fact permits inquiry into the sincerity of the beliefs of a religious solicitor. *United States v. Ballard*, 322 U. S. 78 (1944), does not resolve the issue. See pet. for cert. at 21 - 22.[2] Moreover, the courts and commentators have uniformly recognized the intractable dangers inherent in sincerity inquiries. *E.g., Gillette v. United States*, 401 U. S. 437, 455 - 57 (1979). Professor Tribe, who was listed among respondent's counsel in the court below, states that the arguments against judicial inquires into sincerity "are most convincing when government seeks to protect gullible citizens from fraudulent religious claims, since protection from the "wrong" of mental and spiritual poison is precisely what the Constitution put beyond the prosecution's reach" L. Tribe, *American Constitutional Law*, Section 14 - 12, p. 1245 (1987). See also pet. for cert. at 21 - 22. More recently Judge Noonan, a highly regarded commentator on the relationship between law and religion, has extensively explored the dangers to religious liberty in permitting sincerity inquiries. Noonan, *How Sincere Do You Have To Be To Be Religious*, 1988 U. of Ill. L. Rev.

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[2] The petition for certiorari demonstrated that one of the difficulties in the court's "secular/religious approach" is that, all too frequently, it is tantamount to sanctioning a direct inquiry into petitioner's sincerity *vel non*.

713.[3] Judge Noonan correctly notes the propensity of sincerity inquiries to lead into an inquiry into religious doctrine: "Sincerity of belief is difficult to discriminate from the content of belief." *Id.* at 722. This danger is not speculative; inquiry into the church's religious beliefs occurred in this case. See pet. for cert. at pp. 18 - 19.

It is, of course, widely acknowledged that the dangers posed by sincerity inquiries may be an unavoidable necessity when independent, third party interests are at stake. See for example, *Gillette v. United States, supra*; *Frazee v. Illinois Dept. of Employment Security*, 109 S. Ct. 1514, 1517 (1989). But no such countervailing third party interest exists here; only the interest of the church and one of its donors is at issue. See pet. for cert. at 21 - 22.

Third. The court below repeatedly acknowledged that respondent's gifts were religiously motivated. See pet. for cert. at p. 14. Respondent's $5 million gift was made by a "born-again-Christian," a believer thoroughly saturated with church and teachings as a result of reading church pamphlets, attending Bible classes, listening to sermons and tapes of church leaders, and interacting with fellow believers in a large and vibrant religious community (p. 11 n. 7). Her gift was the product of

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3 Among other things, Judge Noonan directs attention to the difficulties in determining how to go about measuring sincerity; he observes that sincerity inquiries erroneously proceed on the basis of a "literal minded" conception of religious truth; and he notes that sincerity inquiries wholly fail to deal with the situation of the clergyman who deviates from or has doubts about some or all of the doctrine. *Id.* at 718 - 19.

her whole experience, and the gift was used for the very purposes she designated. To permit rescission of such a religiously motivated gift on the basis of a judicial determination that the donor's will was "overcome" because some of the donor's religious experiences may have been affected by the insincerely held beliefs of others is to license a judicial inquiry of a truly alarming nature. Courts would be authorized to sort through a religious teacher's numerous teachings and determine which were sincere and which were not.[4] Then the court would engage in a similar mind probe of the donor, with a view towards disaggregating the various and innumerable influences upon the donor, separating out the "authentic" religious inputs from the "inauthentic" inputs, and then assigning weights to each in the donor's decisional process. Argument or citation cannot make plainer that such ill-defined, after-the-fact, judicial determination threatens the right of all religious communities to preach, teach doctrine and to receive donations. Such inquiries contravene both religion clauses and should never be allowed, as the *amicii* demonstrate.[5] Surely, at an absolute minimum, the constitution precludes rescission absent the most cogent proof of

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4 No one suggests that the church and its pastors believed *none* of what they taught petitioner. To permit rescission here because of a conclusion that the church leaders did not believe *some* of their statements would render a wide range of gifts vulnerable to rescission for fraud or undue influence. As Judge Noonan put it, "Let us examine how a priest or minister accepting much of modern biblical criticism would fare if a sincere belief in everything were necessary for constitutional protection." (*Id.* at 720)

5 See *Brief for the National Council of the Churches of Christ in the U.S.A. and Council on Religious Freedom as Amici Curiae in Support of Petitioner*, pp. 5 - 12.

but-for causal connection between the allegedly "insincere" statements and the donor's decision to make the gifts.

* * * *

Respondent's effort to recast the court of appeals' opinion is simply one illustration of the routine strategy of respondents seeking to characterize a petition for certiorari as entirely fact-bound. Of course, every case will have its own fact pattern. But the core facts are clear here: respondent made religiously motivated gifts to this church, the gifts were used for the purposes she directed, and her rescission suit has shattered this religious community. More importantly, the questions raised by the petitioner are general in nature. Indeed, respondent's opposition is itself testimony to the need for guidance from this Court on the limits the constitution imposes on rescission suits brought by deprogrammed and now apostate church members.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Dated: New York, New York
July 14, 1989

Respectfully submitted,

s/_____

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